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IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term
1940

ACME FREIGHT LINES, INC.,
A Florida corporation,
Petitioner

vs.

J. M. LEE, as State Comptroller
of the State of Florida.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

To The Honorable The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

SUMMARY STATEMENT OF MATTER INVOLVED

This case challenges the validity under the Federal Constitution of Chapter 19446, Laws of Florida, Acts of 1939 (commonly and herein referred to as the Diesel Act), as it applies to Petitioner. It is the first test of that law to reach this Court.

The Diesel Act imposes an excise tax of seven cents per gallon upon the *use* of fuel or motor vehicle fuel only when such fuel is used in an engine to create power to

propel a motor vehicle over the public highways of Florida (Diesel Act, Sec. 2, Appendix p. 13). It defines "fuel" or "motor vehicle fuel" to be the combustible gases or liquids used in an engine to create power to propel a vehicle on the Florida highways *other than* the fuels subject to Chapter 15659, Laws of Florida, Acts of 1931, as amended, namely the act taxing the *sale* or *storage* in Florida of gasoline and kerosene. (Diesel Act, Sec. 1, Appendix p. 12). Said Act defines and requires a "user" of such fuel to file an application for and secure a license as a user, with a separate license card for each motor vehicle using same. A $5.00 fee is exacted for the filing, and a $1.00 fee for each separate license (Said Act, Sec. 6, Appendix p. 17). Grave civil and criminal penalties are provided for any violation.

Petitioner is a certificated common carrier of property for compensation by motor vehicle, operating into and from Florida under authority from the Interstate Commerce Commission obtained pursuant to the Motor Carrier Act, 1935 (49 U. S. C. A., Section 301). *It so transports such property solely and exclusively in interstate commerce, doing no intrastate business in Florida.* It operates seven motor vehicles powered by diesel engines which burn diesel oil, thereby being a user of fuel as defined above.

Petitioner filed its Bill of Complaint against J. M. Lee, State Comptroller of Florida, seeking an injunction to restrain collection of the tax (Tr. 1-23). The propriety of this remedy and procedure is recognized. The grounds here relied upon were presented by said complaint (Tr. 16). After due notice the Circuit Court refused an injunction and dismissed the bill (Tr. 31-32). On appeal to the Supreme Court of Florida, this action was affirmed by

an opinion rendered July 5, 1940, (Tr. 41-45), which petitioner seeks to review. Rehearing (Tr. 46-48) was denied July 31, 1940 (Tr. 50).

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

1. Petitioner uses the fuel to furnish power to move property exclusively in interstate commerce. The use of the fuel is essential to the conduct of Petitioner's business. The Diesel Act imposes an excise gallonage tax upon such use. Therefore, as it applies to Petitioner, the Diesel Act clearly and decisively violates Article 1, Section 8, of the Federal Constitution in that it imposes a direct burden upon an essential instrumentality of interstate commerce.

James R. Helson, etc., vs. Commonwealth of Kentucky, 279 U. S. 245, 73 L. ed. 683;

Bingaman vs. Golden Eagle Western Lines, Inc., 297 U. S. 626, 80 L. ed. 928 (See: *Bowman vs. Continental Oil Co.*, 256 U. S. 642, 65 L. ed. 1139; *George E. Breece Lumber Company, et al., vs. Gilberto Mirabal, etc.* 34 N. M. 643, 287 Pac. 699, 84 A. L. R. 827; *United States Airways, Inc. vs. Shaw, et al*, 43 F. (2nd) 148; *Mid Continental Express Corporation vs. Lujan*, 47 F. (2nd) 266);

Askren vs. Continental Oil Co., 252 U. S. 444, 64 L. ed. 654;

Eastern Air Transport, Inc. vs. South Carolina Tax Commission, 285 U. S. 117, 76 L. ed. 673.

2. The Supreme Court of Florida upheld the validity of the Diesel Act upon the nebulous theory that it was

intended as compensation for the use of the public roads. That Court's opinion is amazingly but candidly devoid of any logic, argument or reason to support such view (Tr. 41-54). Chief Justice Terrell dissented, but withdrew his opinion before publication. We quote it (Appendix pp. 8-11) because of its obvious soundness and clear statement that the Diesel Act imposes an excise tax, pure and simple, upon the use of fuel and is not a charge exacted for the use of the highways.

This Court is not bound by the Florida Supreme Court's unwarranted assumption that the Diesel Act was intended as compensation for the use of the roads. Petitioner's rights are protected by the Federal Constitution, and the tax challenged is a substantial invasion of those rights. *This Court has the power and the duty to protect them.*

> *Schuylkill Trust Company vs. Commonwealth of Pennsylvania,* 296 U. S. 113, 80 L. ed. 91 (97);
>
> *MacAllen Company vs. Commonwealth of Massachusetts,* 297 U. S. 620, 73 L. ed. 874.

The conclusion is inescapable that the Diesel Act is not compensatory for the use of the roads. Petitioner pays mileage taxes to the State of Florida each month in large sums (Tr. 5) as required by Chapter 14764, Laws of Florida, Acts of 1931. That Act provides:

> "*All mileage taxes* prescribed by this Act and all such taxes imposed on auto transportation companies using the public highways in the transportation of persons or property for compensation

shall be deemed to be compensatory for the use of the public highways of this state by auto transportation companies taxed under the provisions of this Act and *as a fair contribution to the cost of constructing and maintaining the public highways of this state* * * * *".

(Section 26, said Act, Emphasis supplied.)

Thus Florida has one act *expressly* exacting a charge as compensation for the use of the highways. Petitioner complies with and does not question that act. By its plain terms, however, the Diesel Act does not even purport to impose such a charge or toll. It says absolutely nothing about such things, and professes to be an excise tax on the use of fuel.

This Court has said:

"But the mere fact that the tax falls upon one who uses the highway is not enough to give it presumptive validity",

and

"The conclusion that the tax challenged is laid for the privilege of doing business and not as compensation for the use of the highways is confirmed by contrasting paragraph 4 of the 1927 Act with those statutes which admittedly provide for defraying the cost of constructing and maintaining highways and regulating traffic thereon".

Interstate Transit, Inc. vs. Lindsey, 283 U. S. 183, 75 L. ed. 953.

Thus, the single and mere fact that the Diesel Act falls upon one who uses the highways does not give it presump-

tive validity. Further, the conclusion that it is an invalid excise on the use of fuel is confirmed by contrasting it with Chapter 14764, supra, which admittedly exacts "a fair contribution to the cost of constructing and maintaining the public highways" of Florida.

There is an utter, complete and absolute failure to affirmatively show that the Diesel Act exacts a charge as compensation for their use or to pay the cost of policing or maintaining the highways.

Dixie Ohio Express Company vs. State Revenue Commission of Georgia, 306 U. S. 72, 83 L. ed. 495.

3. The following illustration demonstrates that the Diesel Act violates the Fourteenth Amendment, Section 1, of the Federal Constitution: Petitioner paid to the State of Florida $3,187.37 as "mileage taxes" in 1938; $2,126.17 as such taxes in the first seven months of 1939, and will continue to pay them each month (Tr. 5). Such mileage taxes "shall be deemed to be compensatory for the use of the public highways" * * * and "as a fair contribution to the cost of constructing and maintaining the public highways". (Sec. 26, Chapter 14764, Acts of 1931, ante p. 5). St. Johns River Line, a common carrier by water, and the Florida East Coast Railway, a common carrier by rail, both *direct competitors of Petitioner*, do *not* pay such mileage taxes (Tr. 13). Thus Petitioner, using the roads and paying the mileage tax for such use bears its share of highway expense and stands on an equal basis with the other carriers. All three use the same fuel to carry interstate commerce (Tr. 13), but *only* Petitioner is required under the Diesel Act to pay the tax. The unfairness to, discrimination against and lack of com-

pensatory benefits to Petitioner are apparent. Beyond cavil, the Diesel Act denies plaintiff the equal protection of the laws.

WHEREFORE, Petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Florida, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the records and proceedings herein; and that the decree of the Supreme Court of the State of Florida be reversed by this Honorable Court, and Petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully,

C. D. RINEHART

FRANCIS P. CONROY

Counsel for Petitioner

APPENDIX
DISSENTING OPINION OF CHIEF JUSTICE TERRELL

TERRELL, C. J. Dissenting:

Appellant is a duly certified common carrier under the General Motor Carrier Act of 1935. It is engaged in the business of transporting goods exclusively in interstate commerce from points in Florida to points without the State. It conducts no intrastate business but pays the mileage taxes exacted by Chapter 14764, Acts of 1931.

In October, 1939, Appellant as Complainant filed its bill of complaint in the Circuit Court seeking to enjoin the Comptroller from enforcing payment by it of the excise tax imposed by Chapter 19446, Acts of 1939. The Chancellor dismissed the bill of complaint and this appeal is from that decree.

It is contended that as to Appellant, Chapter 19446, Acts of 1939, is violative of Section Eight, Article One of the Federal Constitution, in that it imposes a direct burden on interstate commerce. *Helson vs. Commonwealth of Kentucky*, 279 U. S. 245, 49 Sup. Ct. 279, 73 L. Ed. 683; *Bingaman vs. Golden Eagle Western Lines, Inc.*, 297 U. S. 626, 56 Sup. Ct. 624, 80 L. Ed. 928; *Bruce Lumber Company vs. Gilberto Mirabal*, 34 N. M. 643, 287 Pac. 699; *Transcontinental and Western Air Lines vs. Lujan*, 36 N. M. 64, 8 Pac. (2nd) 103, and cases of like import are relied on to support this contention.

Appellee contends on the other hand that the tax assailed has no such effect and should be upheld. He relies on the following cases to support his contention. *Dixie Ohio Express Company vs. State Revenue Commission of Georgia*, 306 U. S. 72, 59 Sup. Ct. 435; 83 L. Ed. 495;

Clark vs. Poor, 274 U. S. 554, 47 Sup. Ct. 702, 71 L. Ed. 1199; *Interstate Busses Corporation vs. Blodgett*, 276 U. S. 245, 48 Sup. Ct. 230, 72 L. Ed. 551, and *Miami Trail Tours, Inc., vs. Lee*, ... Fla. ..... 194 So. 305.

The pith of the holding in the last cited cases is that if the tax or charge is limited to a reasonable compensation for use of the highways, it will be upheld if it amounts to nothing more than a fair contribution for their construction and maintenance. The fact of being an interstate commerce carrier is not material and will not relieve from the contribution.

The cases relied on by Appellant hold in effect that the regulation of interstate and foreign commerce is committed exclusively to Congress and that any State law which directly or otherwise imposes a burden on such commerce by taxation or otherwise is beyond the power of the State under the Federal Constitution to enact.

In this situation, the question presented turns on whether the Statute assailed exacts a charge for the use, upkeep, and policing of the highways of the State or whether it imposes an excise tax for the use of an instrumentality of interstate commerce. Many cases in addition to the ones cited discuss the two phases of this question and in some of them the line of distinction is hazy and nebulous. Section Two is the pertinent part of the act assailed and is as follows:

> "An excise tax of seven cents (7c) per gallon is hereby imposed on the use of such fuel by any person within this State only when such fuel is used in an internal combustion engine for the generation of power to propel motor vehicles of

any kind or character on the public highways of Florida to be computed in the manner hereinafter in this Act set forth and paid by the users."

The validity of this Section was considered by us and upheld in *Tamiami Trail Tours, Inc., vs. Lee*, supra, but only on the point of whether or not the exemption provisions of Chapter 14764, Acts of 1931, were repealed by Chapter 19446, Acts of 1939. This decision has no relation to or influence on the case at bar as its effect on interstate carriers was not before us.

In the case at bar, it is not denied that appellant operates exclusively in interstate commerce, that it is licensed under the Federal Motor Carrier Act of 1935, and that it has paid all mileage taxes exacted under Chapter 14764, Acts of 1931. None of the salient facts of the case are in dispute.

It will be discerned that Section Two as quoted imposes an excise tax of seven cents per gallon on the use of distillate when used as fuel but only when so "used in an internal combustion engine to propel motor vehicles on the public highways of Florida". Appellee contends that the act should be construed as exacting nothing more than a fair compensation for the use of the highways and should be upheld on that ground.

We do not think that this contention can be sustained. The act imposes an excise tax pure and simple when used as a fuel to propel vehicles on the highways and if used for any other purpose, the excise is not imposed. The complainant is engaged solely in interstate commerce and being so, we cannot escape the conclusion that the act

assailed is condemned by the cases relied on by Appellant. To uphold an act under the facts presented, there must be an affirmative showing that the charge exacted is for the use of the highways. *Dixie Ohio Express Co. vs. State Revenue Commissioners*, supra. Neither the scope nor language of the act warrants such conclusion.

There must be some affirmative showing that the charge complained of was imposed as a reasonable compensation for the use of the highways before it will be approved as to interstate carriers. Casual examination of Chapter 19446, does not warrant any such conclusion but shows rather that it was intended as an excise for revenue without respect to the carrier affected. It cannot be enforced as to appellant.

There are other assignments of less moment which we have considered but comment on them is not necessary.

Reversed.

CHAPTER 19446—(No. 451)
COMMITTEE SUBSTITUTE FOR HOUSE BILL No. 1969

AN ACT Relating to Taxation, Levying and Imposing an Excise Tax on the Use of "Fuel" or "Motor Vehicle Fuel" Which Shall Mean and Include All Combustible Gases and Liquids Used in an Internal Combustion Engine for the Generation of Power to Propel Vehicles of Any Kind or Character on the Public Highways of the State of Florida, Excepting Such Fuels as Are Subject to the Tax Imposed by Chapter 15659, Laws of Florida, Acts of 1931, or Any Other Gasoline Taxing Acts of the State of Florida; Levying and Imposing a

License Tax on the Use of "Fuel" or "Motor Vehicle Fuel"; Providing for the Report of the Use of Such Commodities, and the Collection and Payment of Such Taxes; Creating Special Funds for the Reception of Such Taxes; Providing the Purposes of Such Taxes, and the Deposit, Appropriation and Disposition of the Proceeds Derived From Such Taxes; Providing for the Enforcement of This Act and Penalties for Violation Hereof.

Be It Enacted by the Legislature of the State of Florida:

Section 1. DEFINITIONS. — Wherever used in this Act, unless context requires otherwise:

(a) "Motor Vehicles" shall mean and include all vehicles, engines, machines or mechanical contrivances which are propelled by internal combustion engines or motors;

(b) "Fuel" or "Motor Vehicle Fuel" shall mean and include all combustible gases and liquids used in an internal combustion engine for the generation of power to propel vehicles of any kind or character on the public highways except such fuels as are subject to the tax imposed by Chapter 15659, Laws of Florida, Acts of 1931, or any other gasoline taxing Acts of the State of Florida.

(c) "Public Highways" shall mean and include every way or place, of whatever nature, generally open to the use of the public as a matter of right for the purpose of vehicular travel and notwithstanding that the same may be temporarily closed for the purpose of construction, re-construction, maintenance or repair;

(d) "Person" shall mean and include any individual, association, firm, co-partnership, corporation, receiver, trustee, conservator or other officer appointed by any State or Federal Court;

(e) "Use" shall mean and include, in addition to its orgininal meaning, the receipt of fuel by any person into a motor vehicle or into a receptacle from which fuel is supplied by such person to his own or other motor vehicles;

(f) "User" shall mean any person who uses or consumes fuel within this State in an internal combustion engine for the generation of power to propel vehicles of any kind or character on the public highways of this State;

(g) "Duly Licensed User" shall mean and include any user holding an unrevoked license issued by this State.

Section 2. LEVY OF TAX AND EXEMPTIONS.—An excise tax of seven cents (7c) per gallon is hereby imposed on the use of such fuel by any person within this State only when such fuel is used in an internal combustion engine for the generation of power to propel motor vehicles of any kind or character on the public highways of Florida to be computed in the manner hereinafter in this Act set forth and paid by the users.

Section 3. ALLOCATION OF TAX. — Said tax of seven cents (7c) per gallon being made up of three separate taxes, being:

First "Motor Vehicle Fuel" tax: A tax of three cents (3c) per gallon for the use of the State Road Department, as provided by law.

Second "Motor Vehicle Fuel" tax: A tax of three cents (3c) per gallon to be apportioned, as provided by Chapter 15659, Laws of Florida, Acts of 1931, and Acts amendatory thereto.

Third "Motor Vehicle Fuel" tax: A tax of one cent (1c) per gallon to be paid into the General Revenue Fund of the State of Florida.

After the payment of all expenses incident to the administration of this Act, all moneys derived from the "Motor Vehicle Fuel" taxes imposed by this Act shall be paid into the State Treasurer by the Comptroller, as follows:

First "Motor Vehicle Fuel" tax: Shall be paid into the "State Road License Fund", created by Chapter 15659, Laws of Florida, Acts of 1931.

Second "Motor Vehicle Fuel" tax: Shall be paid into the "State Road Distribution Fund," created by Chapter 15659, Laws of Florida, Acts of 1931.

Third "Motor Vehicle Fuel" tax: Shall be paid into the "General Revenue Fund" of the State of Florida.

The first and second "Motor Vehicle Fuel" taxes collected under this Act shall be distributed, used and/or appropriated in the same manner as gasoline tax moneys are used, distributed and/or appropriated as provided by Chapter 15659, Laws of Florida, Acts of 1931, and all Acts amendatory thereto. The third "Motor Vehicle Fuel" tax shall be paid into the General Revenue Fund of the State of Florida.

Section 4. There is hereby appropriated for use by the Comptroller, before any distribution is made of any "Motor Vehicle Fuel" taxes imposed herein, so much of the "Motor Vehicle Fuel" taxes, filing fees and penalties imposed by this Act as may be necessary to pay the expenses incident to the administration of this Act, including postage, clerical aid, legal expenses, costs and expenses incident to litigation, and the payment of such sums of money as the Comptroller may from time to time determine shall be refunded to any person, firm or corporation making overpayment of such taxes, provided that before expending any money derived from the taxes imposed by this Act for expenses, the Comptroller shall first apply to the payment of such expenses all money received from filing fees and penalties under this Act.

Section 5. APPLICATION FOR LICENSE: CONTENTS: LICENSING OF USERS.—A. It shall be unlawful for any user to use or consume any fuel within this State unless such user is the holder of an uncancelled license and an uncancelled separate license card for each motor vehicle issued by the Comptroller of the State of Florida. Such license card shall indicate the number assigned to such user, the motor number of the motor vehicle authorized to be operated under such license card and such other information as the Comptroller may prescribe. Such license card shall not be transferable and shall be conspicuously displayed on such motor vehicle to which it is assigned, and any user operating a motor vehicle in this State without such license card shall be guilty of a misdemeanor and upon conviction shall be fined in an amount not exceeding $500.00, or be imprisoned for a term not exceeding six months, or by both fine and imprisonment in the discretion

of the Court. To procure such license and license card, every user shall file with the Comptroller an application under oath and in such form as the Comptroller may prescribe, and shall otherwise comply with this Act.

B. Concurrently with the filing of an application for a license and license card, every user shall file with the comptroller a bond of the character stipulated and in the amount provided for in Section 6 of this Act. No license or license card shall be issued under any application unless accompanied by such a bond.

C. In the event that:

(1) Any application for a license to use fuel as a user in this State shall be filed by any person whose license shall at any time theretofore have been cancelled for cause by the Comptroller, or in case

(2) Said Comptroller shall be of the opinion that such application is not filed in good faith or that

(3) Such application is filed by some person as a subterfuge for the real person in interest whose license or registration shall theretofore have been cancelled for cause by said Comptroller, then and in any of said events, the Comptroller after a hearing of which the applicant shall have been given not less than five (5) days' notice in writing and in which said applicant shall have the right to appear in person or by counsel and present testimony, shall have and is hereby given the right and authority to refuse to issue to said person a license.

D. Upon the filing of the application for a license and license card, a filing fee of Five ($5.00) Dollars shall be

paid to the Comptroller, plus One ($1.00) Dollar for each motor vehicle.

E. The application in proper form having been accepted for filing, the bond having been accepted and approved and the other conditions and requirements of this Act having been complied with, the Comptroller shall issue to such user a license and a license card for each motor vehicle to be used, and such license and license card for each motor vehicle to be used shall remain in full force and effect until cancelled as provided in this Act.

F. The License so issued by the Comptroller shall not be assignable and shall be valid only for the user in whose name issued and shall be displayed conspicuously by the user.

G. The Comptroller shall keep and file all applications and bonds with an alphabetical index thereof, together with a record of all licensed users.

Section 6. BOND REQUIRED OF LICENSED USERS. —A. Every user shall file with the Comptroller a bond:

(1) In the penal sum of not less than Five Hundred ($500.00) Dollars nor more than Ten Thousand ($10,000.00) Dollars. The amount of the bond within the limits fixed by this Act shall be determined by the Comptroller and shall be in an amount not more than three (3) times the average monthly tax liability under this Act of such user, based on such tax liability of the next preceding twelve (12) calendar months. The limitation on the amount of the bond which shall be fixed by the Comptroller as set out herein, shall not be effective until this Act shall have been in

operation for twelve (12) calendar months and until such time the Comptroller shall determine the amount of the bond, using his discretion in estimating the probable amount of taxes that will be due by the user under this Act, and requiring a bond in the sum of not less than three (3) times the estimated monthly amount of such tax. All bonds shall be in such form as may be approved by the Comptroller and shall be executed by some surety company duly licensed to do business in the State of Florida as surety thereon and upon which such user shall be the principal obligor and the State of Florida shall be the obligee.

(2) Conditioned upon the prompt filing of true reports and the payment of such user to the Comptroller of any and all fuel excise taxes which are now or which are hereafter levied or imposed by this State, together with any and all penalties and/or interest thereon and generally upon faithful compliance with the provisions of this Act.

B. In the event that the liability upon the bond thus filed by the user with the Comptroller shall be discharged or reduced, whether by judgment rendered, payment made, or otherwise, or if in the opinion of the Comptroller any surety on the bond theretofore given shall have become unsatisfactory or unacceptable, then the Comptroller may require the user to file a new bond with satisfactory sureties in the same form and amount, failing which the Comptroller shall forthwith cancel the license certificate of said user. If such new bond shall be furnished by such user as above provided, the Comptroller shall cancel and surrender the bond of said user for which such new bond shall be substituted.

C. In the event that upon hearing, of which the user shall be given five (5) days' notice in writing, the Comptroller shall decide that the amount of the existing bond is insufficient to insure payment to this State of the amount of the tax and any penalties and interest for which said user is or may at any time become liable, then the user shall forthwith, upon the written demand of the Comptroller, file an additional bond in the same manner and form with surety thereon approved by the Comptroller in any amount determined by the Comptroller to be necessary to secure at all times the payment by such user to this State of all taxes, penalties, and interest due under the provisions of this Act, failing which, the Comptroller shall forthwith cancel the license certificate of said user.

D. Any surety on any bond furnished by any user as heretofore provided shall be released and discharged from any and all liability to this State accruing on said bond after the expiration of sixty (60) days from the date upon which such surety shall have lodged with the Comptroller a written request to be released and discharged. Provided, however, that such a request shall not operate to relieve, release or discharge such surety from any liability already accrued or which shall accrue, before the expiration of said sixty (60) day period. The Comptroller shall promptly, on receipt of notice of such request, notify the user to furnish such bond and unless such user shall, on or before the expiration of such sixty (60) day period, file with the Comptroller a new bond with surety satisfaction to the Comptroller in the amount and form hereinbefore in this Section provided, the Comptroller shall forthwith cancel the license of said user. If such new bond shall be furnished by said user as above provided, the comptroller shall cancel and

surrender the bond of said user for which such new bond shall be substituted.

Section 7. TAX REPORTS. COMPUTATION AND PAYMENT OF TAX.—A. For the purpose of determining the amount of tax herein imposed, each user shall, not later than the fifteenth (15) day of each calendar month, file with the Comptroller on forms prescribed by said Comptroller, monthly reports sworn to by the user which shall include the total number of gallons or fuel used within the State during the next preceding calendar month.

B. The tax at the rate of seven cents (7c) per gallon of fuel shall be computed on the number of gallons reported used within the State and shall constitute the amount of fuel tax payable for the next preceding calendar month. Reports required in subsection A of this Section shall be accompanied by certified or Cashier's check, payable to the State Comptroller for the amount of tax due for such preceding calendar month.

Section 8. POWER OF COMPTROLLER TO CANCEL LICENSE: SURRENDER OF BOND.—A. If a user shall at any time file a false monthly report of the data or information required of this Act, or shall fail, refuse or neglect to file the monthly report required by this Act or to pay the full amount of the tax as required by this Act, the Comptroller may forthwith cancel the license and license card of said user and notify such user in writing of such cancellation by registered mail to the last known address of such user appearing on the files of the Comptroller.

B. Upon receipt of a written request from any user

licensed under this Act to cancel the license and license card issued to such user, the Comptroller shall have the power to cancel such license and license card effective sixty (60) days from the date of such written request, but no such license and license card shall be cancelled upon the request of any user until and unless the user shall, prior to the date of such cancellation, have paid to this State all excise taxes payable under the laws of this State, together with any and all penalties, interest and fines accruing under any of the provisions of this Act and until and unless the user shall have surrendered to the Comptroller the license and license card theretofore issued to such user. If upon investigation the Comptroller shall ascertain and find that any person to whom a license and license card has been issued under this Act is no longer engaged in the use of fuel and has not been engaged for a period of six (6) months, the Comptroller shall have the power to cancel such license and license card by giving such person sixty (60) days' notice of such cancellation mailed to the last known address of such person, in which event the license and license card theretofore issued to such person shall be surrendered to the Comptroller.

C. In the event that the license and license card of any user shall be cancelled by the Comptroller as hereinbefore in this section provided, and in the further event that said user shall have paid to this State all excise taxes due and payable by it under this Act, together with any and all penalties accruing under any of the provisions of this Act, then the Comptroller shall cancel and surrender the bond theretofore filed by said user.

Section 9. FAILURE TO REPORT AND PAY TAX: PENALTIES PROVIDED.—If any user neglects or re-

fuses to make said return, or pay the tax at the time hereinbefore provided, the amount thereof, with an addition of a penalty of twenty per cent (20%) thereof, with interest at the rate of six percent (6%) per annum from the date when due until paid, shall be paid on accounts settled by the Comptroller, as other taxes are paid, settled and collected; and if collected by proceedings in any court, an additional penalty of twenty per cent (20%) shall be collected, in the same manner as other statutory penalties.

Section 10. COMPTROLLER MAY ESTIMATE FUEL USED.—A. Whenever any user shall neglect or refuse to make and file any report for any calendar month as required by this Act, or shall file an incorrect or fraudulent report, the Comptroller shall determine, after an investigation, the number of gallons of fuel with respect to which the user has incurred liability under the fuel tax laws of this State, for any particular month or months and assess and collect the amount of taxes and penalties payable by the user under this Act accordingly.

B. In any action or proceeding for the collection of the fuel tax and/or any penalties or interest imposed in connection therewith, an assessment by the Comptroller of the amount of the tax due and/or the interest or penalties due to the State shall constitute prima facie evidence of the claim of the State, and the burden of proof shall be upon the user to show the assessment was incorrect and contrary to law.

Section 11. REPORTS FROM CARRIERS TRANSPORTING FUEL.—A. Every railroad company, every street, suburban or interurban railroad company, every pipe line company, every water transportation company,

and every common carrier transporting fuel, either in interstate or in intrastate commerce, to points within the State, and every person transporting fuel by whatever manner to a point in this State from any point outside of said State and with the definite knowledge that such fuel is to be used in an internal combustion engine for the generation of power to propel a motor vehicle of any kind or character upon the public highways of this State, shall report under oath to the Comptroller on forms prescribed by said Comptroller of all such deliveries of fuel so made to points within this State.

B. Such reports:

(1) Shall cover monthly periods.

(2) Shall be submitted within fifteen (15) days after the close of the month covered by the report.

(3) Shall show the name and address of the person to whom the delivery of such fuel has actually and in fact been made and such other reasonable information deemed necessary by the Comptroller.

Section 12. RETENTION OF RECORDS BY USERS. —A. Each user shall maintain and keep for a period of two (2) years such record or records of fuel used within this State by such user, together with invoices, bills of lading, and other pertinent records and papers as may be required by the Comptroller for the Administration of this Act.

B. Penalty: Any person willfully violating any of the provisions of this Section shall be guilty of a misde-

meanor and shall, upon conviction thereof, be sentenced to pay a fine of not less than One ($1.00) Dollar and not more than One Thousand ($1,000.00) Dollars, and costs of prosecution, or to undergo imprisonment for not more than one year, or both in the discretion of the Court.

Section 13. POWERS OF THE COMPTROLLER.—A. The administration of this Act is vested in the State Comptroller who may prescribe forms and promulgate rules and regulations needed for the enforcement of this Act.

B. The Comptroller, through a representative appointed by him in writing, is hereby authorized to examine the books, records, papers, files, equipment and/or inventory of any person made liable for any tax under the provisions of this Act; to examine witnesses under oath for purposes appropriate for enforcement of this Act; and to examine the books, records, papers, files equipment and/or inventory of manufacturers, wholesalers, retailers, or carriers for the purpose of determining whether the Act is being violated.

C. The Comptroller shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and/or enforcing the collection thereof with penalties and interest thereon, and for the purpose of enjoining the operation of the business of the delinquent.

D. The Comptroller may at or after the commencement of an action for the purpose of collecting the amount of tax due and penalty and interest thereof, as set out herein, have an attachment against the property of the person liable for the tax or garnishment of his debtors without

the execution of bond on the filing of an affidavit showing the nature of the claim, that it is just, the sum which the Comptroller believes the State should recover, and any of the grounds provided by the Statutes of this State for the issuance of an attachment in civil causes.

Section 14. INFORMATION PRIVILEGED.—Any information obtained by the Comptroller or his agent or representative thereof as a result of a report, investigation or verification herein authorized to be made, shall be confidential and any person divulging any such information except upon order of a court of competent jurisdiction or to an officer of the State entitled to receive the same in his official capacity shall be guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five ($25.00) Dollars nor more than five hundred ($500.00) Dollars.

Section 15. PENALTIES FOR FAILURE TO MAKE RETURNS, TO PAY TAX, OR TO PERMIT EXAMINATION OF RECORDS. Any person who shall fail, neglect or refuse to make the returns and pay the tax herein prescribed, or shall refuse to permit the Comptroller, his assistants, agents, or representatives appointed by him, to examine the books, records, papers, files and equipment of such person pertaining to the use of fuel made taxable by this Act, or who makes any incomplete, false or fraudulent return hereunder, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of fuel used or to avoid the payment of the whole or any part of the tax or penalties due or who shall fail to keep and preserve records or make reports as provided in this Act, shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than twenty-five ($25.00) Dollars

nor more than One Thousand ($1,000.00) Dollars, and in the case the offender is an individual, he may be imprisoned in the county jail not exceeding six (6) months, or both so fined and imprisoned. Provided, that in case such violator be other than a natural person then the principal officer and/or the officer or officers responsible for such violation, may be punished by such imprisonment.

Section 16. DISCONTINUANCE AS A LICENSE USER.—A. Whenever a user ceases to engage in business as a user of fuel within this State, it shall be the duty of such user to notify the Comptroller in writing within fifteen (15) days after discontinuance. All taxes, penalties and interest under this Act not yet due and payable under the provisions of this Act shall, together with any and all interest accruing or penalties imposed under this Act, notwithstanding any provisions thereof, become due and payable concurrently with such discontinuance. It shall be the duty of said user to make a report and pay all such taxes, interest and penalties and to surrender to the Comptroller the license and license card theretofore issued to said user by the Comptroller.

B. Any person violating any of the provisions of this Section shall be guilty of a misdemeanor and shall, upon conviction thereof, be sentenced to pay a fine of not less than Fifty ($50.00) Dollars nor more than Three Hundred ($300.00) Dollars and costs of the prosecution, or to undergo imprisonment for not more than one (1) year or both in the discretion of the Court.

Section 17. EXCHANGE OF INFORMATION WITH OTHER STATES.—The Comptroller shall, upon request duly received, from the officials to whom are entrusted the

enforcement of the fuel tax laws of any other State or the Federal Government, forward to said officials any information which he may have in his possession relative to the manufacture, receipt, sale, use, transportation and/or shipment by any person of fuel. Provided, however, this Section shall not apply unless such state or Federal Government extend to this State a similar privilege.

Section 17-A. Nothing in this Act shall pertain to tax levied on distillate consumed by household heating plants and farm tractors.

Section 18. SEPARABILITY CLAUSE. The provisions of this Act are severable, and if any of its provisions or any penalty provided by this Act shall be held unconstitutional, such provisions or the particular penalty held to be invalid shall not affect or impair the remainder of the Act or such part of the penalties as are not held to be invalid and the decisions of the courts shall not affect or impair the remaining provisions of this Act or any of the other penalties anywhere in this Act provided. It is hereby declared as a legislative intent that this Act would have been adopted had any unconstitutional provisions or such invalid penalties not been included herein.

Section 19. This Act shall take effect July 1, A. D. 1939.

Became a law without the Governor's approval.

Filed in Office Secretary of State June 12, 1939.

IN THE SUPREME COURT of the UNITED STATES

OCTOBER TERM 1940

ACME FREIGHT LINES, INC.
a Florida corporation,
Petitioner

vs.

J. M. LEE, as State Comptroller
of the State of Florida.

AFFIDAVIT

STATE OF FLORIDA)
COUNTY OF DUVAL)

Lois E. Evans, being duly sworn, says that she is employed in the law office of C. D. Rinehart and Francis P. Conroy, attorneys for Acme Freight Lines, Inc., a Florida corporation, Petitioner in the above styled cause; that on the 3rd day of October, 1940, at 5:30 P. M. she did mail to George Couper Gibbs, Attorney General for the State of Florida, and Nathan Cockrell, Jr., Assistant Attorney General for the State of Florida, attorneys for J. M. Lee, as State Comptroller of the State of Florida, a printed copy of the Transcript of Record and a printed copy of the Petition for Writ of Certiorari filed in said cause, enclosed

in an envelope bearing the requisite amount of United States uncancelled postage stamps, addressed as follows:

Hon. George Couper Gibbs
Attorney General of Florida.
Hon. Nathan Cockrell, Jr.
Assistant Attorney General of
Florida.
The Capitol,
Tallahassee, Florida;

by depositing said envelope, properly sealed, stamped and addressed as aforesaid, in the United States post office box located in the Lynch Building, Jacksonville, Florida, and that the address on said envelope is the usual post office address of the addressees thereof.

.....

Sworn to and subscribed before
me this 3rd day of October, 1940.

.....

Notary Public State of Florida at Large.
My commission expires September 1, 1942.

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IN THE

SUPREME COURT
OF THE
UNITED STATES

October Term
1940

ACME FREIGHT LINES, INC.,
a Florida corporation,
Petitioner

-v-

J. M. LEE, as State Comptroller
of the State of Florida,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Chapter 19446, Acts of 1939, Laws of Florida, which has been unsuccessfully attacked by petitioner in the state courts of Florida and the consideration of which it now attempts to bring here by writ of certiorari, is appended to the petition. It shows in the title that the tax is on the use of fuel only "to propel vehicles of any kind or character on the public highways of the State of Florida." This legislative designation of such use is repeated in Section 1(b) defining the type of fuel; Section 1(f) defining the user; Section 2 imposing the tax and Section 11 setting forth reports to be made by users.

—1—

TAX IMPOSED BY CHAPTER 19446 IS IN COMPENSATION FOR USE OF PUBLIC HIGHWAYS.

As aforestated, the act itself in the title and in four different parts of the body expressly declares that the tax is only upon fuel used to propel vehicles on the public highways of Florida. There would be no reason for such language unless the tax was intended to be in part compensation for the use of the public highways. The lower state court held that such was the only construction to be made of the act and this was affirmed by the Supreme Court of Florida, Acme Freight Lines, Inc. v. Lee, 197 So. 499. This Court has repeatedly held that it should follow the construction of a state statute by the highest court in the state and no reason is shown in the petition why this court should act differently now.

Frost v. Railroad Commission, 271 U. S. 583, 591, 592, 70 L. ed. 1101, 1103, 1104, 46 S. Ct. 605, 47 A.L.R. 457;

Bingaman v. Golden Eagle Western Lines, Inc., 297 U. S. 626, 628, 80 L. ed. 928-931;

Dixie Greyhound Lines, Inc., v. McCarroll 101 F. (2d) 572, 574;

McCarroll v. Dixie Greyhound Lines, Inc., 309 U. S. 176, 84 L. ed. 441, 60 S. Ct. 504.

Chapter 14764, Acts of 1931, Laws of Florida, to which petitioner has referred, does not provide that it shall be the sole method of determining the compensation for the use of the public highways, nor that the compensation

so provided shall be the total compensation for the use of the public highways. Since 1931 when it was passed, motor vehicles have become larger and heavier and better roads are required. Yet taxes under Chapter 14764 are based upon mileage which has not changed. It is therefore proper that additional compensation be required from the users of the public highways.

Petitioner has cited the case of Interstate Transit, Inc. v. Lindsey, infra, but fails to show that the statute involved was a general revenue act dealing with practically all taxes except those relating to highways and the particular section challenged covered occupational licenses on 160 different businesses, including motor bus businesses. The three sentences preceding the first quotation are expressly in point for respondent, as follows (283 U. S. 186):

> "As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use (Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 72 L. ed. 551, 48 S. Ct. 230), or by the express allocation of the proceeds of the tax to highway purposes, as in Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702, supra, or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discrimina-

tory. Hendrick v. Maryland, 235 U. S. 610, 612, 59 L. ed. 385, 35 S. Ct. 140; Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 250-252, 72 L. ed. 551, 554, 555, 48 S. Ct. 230. Compare Interstate Busses Corp. v. Holyoke Street R. Co. 273 U. S. 45, 51, 71 L. ed. 530, 534, 47 S. Ct. 298."

It is shown both in the act itself and in the opinion of the Supreme Court of Florida that the tax is levied as compensation for the use of the highways and that the proceeds are for the greater part allocated to highway purposes. Petitioner has failed to show that the tax bears no reasonable relation to the privilege of using the highways or that it is discriminatory.

—2—

NO VIOLATION OF ARTICLE I, SECTION 8 U. S. CONSTITUTION.

The cases cited by petitioner are not in point since in no instance did the statute involved show any relation between the tax and the use of the public highways. This court has repeatedly held that a state may impose upon vehicles used exclusively for interstate transportation a fair and reasonable tax as compensation for the privilege of using its highways for that purpose, without violation of the provisions of Section 8, Article I of the United States Constitution.

Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 S. Ct. 140;

Interstate Transit, Inc., v. Lindsey, 283 U. S. 183, 75 L. ed. 953, 51 S. Ct. 380;

Bingaman v. Golden Eagle Western Lines, Inc., 297 U. S. 626, 80 L. ed. 928, 56 S. Ct. 624;

Dixie Ohio Express Company v. State Revenue Commission, 306 U. S. 72, 83 L. ed. 495, 59 S. Ct. 435.

There is no allegation that the total amount of taxes paid or due to be paid by petitioner is not a fair and reasonable compensation for the privilege of using the public highways of Florida.

—3—

NO VIOLATION OF 14TH AMENDMENT TO U. S. CONSTITUTION.

As previously stated herein, the mileage taxes paid by petitioner were not by the act imposing them declared to be the entire compensation for the continued use of the public highways nor could the legislature which passed it bind succeeding legislatures by any such declaration. There is no allegation that the taxes under the mileage act and the Diesel act together are more than a fair contribution to the present cost of constructing and maintaining the public highways.

The illustration given by petitioner of competitors which do not pay mileage taxes or taxes on use of diesel oil shows plainly the difference. One competitor uses its own rails and the other water for transportation, so that in neither case is there any wear and tear of the public highways by vehicles of such competitors. These competitors are not specially exempted by either act but do not pay taxes under such acts because they do not use the public highways.

No showing is therefore made that the petitioner is denied the equal protection of the laws or that there is any discrimination against it.

CONCLUSION

It is respectfully submitted that there is shown no violation of Article I, Section 8 of the United States Constitution nor of the 14th Amendment thereto and that therefore the writ of certiorari should be denied.

George Couper Gibbs,
Attorney General.

Nathan Cockrell,
Assistant Attorney General.
Counsel for Respondent.